

ISSUES

The parties agreed that claimant injured his left knee on August 4, 1997, while working for respondent. But the parties could not agree upon the nature and extent of the injury and submitted that issue to Judge Moore. In the July 23, 2001 Award, the Judge determined claimant had a 59 percent functional impairment to the left knee, of which seven percent preexisted the August 1997 accident.

Respondent and its insurance carrier contend Judge Moore erred. They argue the Board should adopt the opinions of the treating surgeon, Dr. Milo G. Sloo, III, and find that claimant now has an 18 percent functional impairment to the left knee, of which 16 percent preexisted the August 1997 accident. Accordingly, respondent and its insurance carrier request the Board to award claimant benefits for a two percent functional impairment to the left lower extremity.

Conversely, claimant requests the Board to affirm the July 23, 2001 Award and grant him benefits for a 52 percent functional impairment to the left lower extremity. Claimant argues Dr. Sloo's functional impairment rating does not comply with the *AMA Guides*.

The only issue before the Board is the nature and extent of claimant's injury and disability. But before that issue can be resolved, the following questions must be addressed:

1. Did the August 1997 accident not only tear the lateral meniscus but also aggravate or accelerate the preexisting arthritic condition in claimant's left knee?
2. Immediately before the August 4, 1997 accident, did claimant have a ratable, functional impairment from his left knee? If so, in what amount?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The Award should be modified. The Board concludes that claimant had a ratable, preexisting functional impairment due to a 1976 left knee surgery in which claimant underwent a total meniscectomy. Therefore, the award should be reduced by taking into consideration that preexisting functional impairment. As determined below, the Board concludes that claimant's permanent partial disability award for a scheduled injury to the left lower extremity should be reduced from 52 percent to 18 percent.
2. Claimant worked for respondent as an over-the-road truck driver. When claimant left respondent's employment in December 1999, he had worked for respondent and its predecessor for approximately 24½ years.

3. On August 4, 1997, claimant injured his left knee while moving a broken pallet jack. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent. In September 1997, claimant underwent left knee surgery.

4. The August 1997 accident was not the first time that claimant had injured his left knee. In 1976, claimant hurt his knee playing softball and underwent surgery for a complete medial meniscectomy. Claimant had a good recovery from that surgery but afterwards would occasionally experience dull throbbing pain and stiffness in the knee after certain physical activity. Following the 1976 surgery, claimant avoided some activities such as basketball, softball, running and other sports.

5. Respondent and its insurance carrier presented the testimony of Dr. Milo G. Sloo, III, the orthopedic surgeon who operated on claimant's left knee in July 1976, following the softball injury, and again in September 1997, following the work injury. Between those surgeries, Dr. Sloo treated claimant in October 1994 for pain and stiffness in the left knee. When the doctor saw claimant in 1994, the doctor believed that claimant had post-traumatic arthritis in the left knee, which had developed as a result of the 1976 surgery and the wear and tear on the knee following that surgery.

6. On September 2, 1997, following the work-related injury, Dr. Sloo performed arthroscopic surgery on claimant's left knee, doing a partial lateral meniscectomy, an anterior synovectomy, chondroplasties of the medial femoral condyle and lateral tibial plateau and a general debridement of spurs.

7. X-rays taken shortly before the September 1997 surgery showed that claimant's knee joint was moderately narrowed to approximately four millimeters. According to Dr. Sloo, when he performed the September 1997 surgery, claimant had severe post-traumatic changes of the cartilage on the ends of both the medial femoral condyle and the lateral tibial plateau, where bone was on bone. But x-rays taken in November 1999 showed even more advanced post-traumatic arthritis, large spurs and narrowing of the cartilage all the way across with the medial side being worn more than the lateral side.

8. Using the fourth edition of the *AMA Guides*, Dr. Sloo rated claimant as having a seven percent functional impairment to the left lower extremity due to the total medial meniscectomy that was performed in 1976. The doctor rated claimant as having a two percent functional impairment to the left lower extremity due to the August 1997 accident. Finally, the doctor rated claimant as having a nine percent functional impairment to the left lower extremity due to the arthritis in the knee, all of which the doctor attributed to the 1976 injury and surgery. Dr. Sloo testified, in part:

He [claimant] had, in '97, he had very significant post-traumatic arthritis and he had significant wear of the whole joint, medial and lateral. The work injury simply tore the lateral meniscus; it was already in jeopardy because of the post-traumatic changes. At that point the joint was narrow and he had spurs, so that cartilage was

already getting worn. But I guess we assume that the incident at work just went ahead and tore it, and we took care of that. But we also in the deal trimmed up all of the other parts of the joint, too, that were irregular because we know we can't get him any better just taking out the most acute tear, so you do the whole thing in the hopes that it makes them better. **And so it's my opinion all the post-traumatic arthritis in that knee was from the original incident.**

It is well known that after a total meniscectomy you're going to develop arthritis in around 19 or 20 years. **It varies quite a bit depending upon how much trauma you have in between.** This man is 250 pounds, puts a lot of pressure on his knees. He's now beginning to have trouble with the other one, and the combination of his size, the surgery 20 years before **and his labor activity** has worn it out. I think you can look at the opposite right knee and you can say, without the original injury on the left, the left knee should be pretty much like this one, like the right one. **So over that 20 year period he developed a moderate or even a little more, or moderate plus general arthritis in his left knee.**¹ (Emphasis added.)

According to Dr. Sloo, claimant will eventually, perhaps in the very near future, need a total left knee replacement and he will eventually wear out his right knee by shifting his weight from the injured left knee.

9. Claimant presented the testimony of Dr. Jane K. Drazek, who specializes in physical medicine and rehabilitation and who also is the medical director of the Via Christi Rehabilitation Center in Wichita. In November 2000, Dr. Drazek examined claimant at his attorney's request for purposes of determining claimant's functional impairment rating for this claim.

10. Upon examining claimant, reviewing past medical records and utilizing the *AMA Guides*, Dr. Drazek testified that claimant sustained a 25 percent functional impairment to his left lower extremity due to the August 1997 accident. The doctor stated, in part:

Q. (Mr. Neustrom) Based upon the information that we've discussed so far, your examination, review of these records, do you have an opinion how much of the fifty percent impairment to the left lower extremity would be related to the old injury as opposed to this work comp injury?

A. (Dr. Drazek) As you know, it's difficult to exactly apportion percentages but what I like to do is take everything into account, including previous records, imaging studies, and history, and from a symptomatic point of view, since he did quite well after the first injury and was able to function understanding that he had arthritic changes prior to the second injury, I would say that I would apportion his impairment

¹ May 2, 2001 deposition testimony of Dr. Milo G. Sloo, III, at pages 14 and 15.

fifty percent to preexisting and fifty percent -- and that is fifty percent of the fifty percent -- and fifty percent to the more recent injury in 1997.

Q. Okay. So if we just isolated the 1997 injury would you have an opinion that he has a twenty-five percent impairment of function as a result of that injury?

A. To the lower extremity, yes.²

In the above exchange between the doctor and claimant's attorney, neither noticed that the 50 percent rating they were discussing only related to the arthritic changes in the knee and did not include the impairment created by the meniscectomies. Moreover, Judge Moore noted in the Award that Dr. Drazek had provided "whole person" ratings for the functional impairment created by claimant's medial meniscectomy³ and partial lateral meniscectomy. Accordingly, the Judge converted the whole person ratings to "lower extremity" ratings and found that claimant had a 59 percent functional impairment to the lower extremity under Dr. Drazek's analysis.

As indicated above, the parties have stipulated that the Judge was correct and that Dr. Drazek's rating for the lower extremity would have been 59 percent had she been asked that question. The parties also stipulated that Dr. Drazek would have testified that claimant sustained a 29½ percent functional impairment to the left lower extremity as a result of the August 1997 accident had she considered both the arthritis and the meniscectomies. And more importantly, the parties agreed those opinions should be considered by the Board as if the doctor had so testified.

11. Dr. Drazek agreed with Dr. Sloo that claimant had severe arthritis in the left knee in 1997. According to Dr. Drazek, the arthritis in claimant's left knee as shown by August 1997 x-rays was significant as compared to the "fairly mild" changes shown in 1994 x-rays. Moreover, Dr. Drazek found that the most recent x-rays, which were taken in November 1999, displayed even greater deterioration as they essentially showed no cartilage. Accordingly, Dr. Drazek concluded that claimant had a moderate loss of cartilage in 1997 but a much greater loss in 1999, indicating that claimant's arthritis had accelerated following the 1997 accident.

12. Dr. Drazek and Dr. Sloo disagree whether the arthritis in claimant's knee was aggravated by the August 1997 accident. Dr. Sloo attributes all of the arthritis in the knee to the 1976 injury and surgery. But, based upon comparing x-rays, Dr. Drazek believes the August 1997 accident accelerated the condition. The Board finds Dr. Drazek's opinion the more persuasive. Moreover, the Board finds that claimant sustained an 18 percent

² April 4, 2001 deposition testimony of Dr. Jane K. Drazek, at page 10.

³ The Judge correctly noted that Dr. Sloo testified that he performed a total medial meniscectomy in 1976 rather than a partial meniscectomy as purportedly rated by Dr. Drazek.

functional impairment to the left lower extremity solely attributable to the August 1997 accident. That rating does not include any functional impairment that existed in the lower extremity before the August 1997 accident and is the approximate average of the 29½ percent rating provided by Dr. Drazek and the six and one-half percent extrapolated from Dr. Sloo's rating, which represents the impairment for the partial lateral meniscectomy and 50 percent of the functional impairment created by the arthritis.⁴

13. Claimant has argued that his award should not be decreased due to preexisting functional impairment. The Board disagrees.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when an accident aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁵

The Board concludes that claimant had a ratable, functional impairment in his left knee before his August 1997 work-related accident due to the total medial meniscectomy that was performed in 1976. It is not imperative that the functional impairment was actually rated or that claimant was given formal medical restrictions. All that is required is that the preexisting condition actually constituted an impairment that was ratable under the AMA *Guides* immediately before the August 1997 accident.⁶ And, in this instance, it was.

14. The 18 percent functional impairment rating determined above is solely attributable to the August 1997 accident and does not include any preexisting functional impairment. As a practical matter, credit has been given and no additional amounts should be deducted under K.S.A. 1997 Supp. 44-501(c) in determining claimant's award. Accordingly, claimant

⁴ The six and one-half percent is computed by adding Dr. Sloo's two percent rating for the partial lateral meniscectomy to four and one-half percent, which represents one-half of the nine percent impairment rating that Dr. Sloo attributed to the arthritis in the knee. As the Board is persuaded by Dr. Drazek that 50 percent of the impairment from the arthritis preexisted the August 1997 accident, applying that percentage to Dr. Sloo's nine percent rating equals four and one-half percent.

⁵ K.S.A. 1997 Supp. 44-501(c).

⁶ See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* ____ Kan. ____ (2001).

is entitled to receive permanent partial disability benefits for an 18 percent functional impairment to the left lower extremity, as provided by the "scheduled" injury statute.⁷

15. The Board adopts the findings and conclusions set forth in the July 23, 2001 Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the July 23, 2001 Award entered by Judge Moore and awards claimant permanent partial disability benefits for a scheduled injury representing an 18 percent functional impairment to the left lower extremity.

Arthur Wagoner is granted compensation from Exide Corporation and its insurance carrier for an August 4, 1997 accident and resulting disability. Based upon an average weekly wage of \$1,427.45, Mr. Wagoner is entitled to receive 36 weeks of permanent partial disability benefits at \$351 per week, or \$12,636, for an 18 percent permanent partial disability, making a total award of \$12,636, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrik W. Neustrom, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁷ See K.S.A. 1997 Supp. 44-510d(a)(16).